Supreme Court of the United States.

No. 481.—October Term, 1906.

Addison Johnson, Agent and Warden of the State Prison of the State of New York at Sing Sing, N. Y., Appellant, *vs.* Charles C. Browne.	Appeal from the Circuit Court of the United States for the Southern District of New York.

[April 8, 1907.]

The respondent sued out a writ of *habeas corpus* from the Circuit Court of the United States for the Southern District of New York, directed to the agent and warden of the State Prison at Sing Sing, in the State of New York, where he was confined, and pursuant to the terms of the writ the respondent was brought before that court in New York city, and after a hearing the court ordered his discharge. The agent and warden has appealed to this court from that order.

The facts appearing on the hearing before the Circuit Court on the return to the writ were these:

The respondent was an examiner of silks in the appraisers' department in the port of New York, and in the spring of 1903, in the Circuit Court of the United States for the Southern District of New York, a grand jury found two indictments against him, one being found against him jointly with two others for conspiring to defraud the United States in violation of section 5440 of the Revised Statutes; and the other was against him alone for knowingly attempting to enter certain Japanese silks upon payment of less than the amount of legal duty thereon, in violation of section 5444, Revised Statutes.

In January, 1904, he, in company with one of the others named in the indictment, (the other having fled the jurisdiction,) was tried in the Circuit Court of the United States for the Southern District of New York upon the indictment charging them with conspiracy. He was convicted and sentenced to imprisonment in the State Prison at Sing Sing, N. Y., for two years.

He appealed to the Circuit Court of Appeals for the Second Circuit, where the conviction was affirmed, and thereafter an application was made in his behalf to this court for a certiorari to review the judgment of conviction, which application was denied in January, 1906.

After his trial and conviction, and pending a review of the judgment, the respondent had been enlarged on bail, and after the judgment was affirmed in the Circuit Court of Appeals and a certiorari from this court had been denied he was, on the 19th of January, 1906, duly called in the Circuit Court to submit himself to sentence, but did not appear, and his default was entered.

A few days subsequently he was found in the Dominion of Canada. This Government then instituted extradition proceedings in Montreal to procure his rendition upon the judgment of conviction of conspiracy to defraud the United States, and claimed it was an extraditable crime under the fourth subdivision of article I of the treaty or "extradition convention" of 1889, between the United States and Great Britain. That subdivision reads as follows:

"4. Fraud by a bailee, banker, agent, factor, trustee or director or member or officer of any company made criminal by the laws of both countries."

The respondent was held for extradition by the Canadian commissioner, but, on writ of *habeas corpus*, the Court of King's Bench held that the conspiracy to defraud the United States, as set forth in the indictment upon which respondent was convicted, was not such a fraud as was provided for in the subdivision of the article of the treaty above referred to. Extradition was therefore refused.

Thereupon the United States secured the rearrest of the respondent on another complaint, charging him with the offenses for which he had been indicted under section 5444 of the Revised Statutes, and for which he had not been tried in New York. The Canadian commissioner held the respondent upon that complaint, and ordered his extradition, and, upon a writ of *habeas corpus*, the Court of King's Bench affirmed that order; and the respondent was then surrendered to the proper agent of the United States, who at once took him to the State of New York, and, having arrived within the Southern District of that State, the marshal of that district, proceeding under the warrant for imprisonment issued by the Circuit Court upon the conviction of the respondent on the conspiracy indictment, took possession of him and delivered him into the custody of the warden of Sing Sing Prison, there to be imprisoned for two years according to the sentence imposed upon him under the conviction as stated.

The respondent then obtained this writ upon a petition setting forth the above facts, and claimed that his imprisonment was in violation of the third and seventh articles of the extradition treaty between the United States and Great Britain. (26 Stat. 1508.) The warden of the prison made return August 7, 1906, that he held the respondent by virtue of the final judgment of the Circuit Court of the United States for the Southern

District of New York, rendered on the 9th of March, 1904, as above set forth.

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

It does not appear that any movement has been made or notice given by this Government to try the respondent on the indictment for the crime for which he has been extradited, but his imprisonment in Sing Sing Prison is upon a conviction of a crime for which the Canadian court had refused to extradite him, and is entirely different from the one for which he was extradited. In other words, he has been extradited for one offense and is now imprisoned for another, which the Canadian court held was not, within the treaty, an extraditable offense.

Whether the crime came within the provision of the treaty was a matter for the decision of the Dominion authorities, and such decision was final by the express terms of the treaty itself. (Article 2, Convention of July 12, 1889, 26 Stat. 1508; United States Treaties in Force April 28, 1904, pages 350, 351.)

We can readily conceive that if the Dominion authorities, after the Court of King's Bench had decided that the crime of which respondent had been convicted and for which extradition had been asked was not extraditable, and the request for extradition had, therefore, been refused, had been informed on the subsequent proceeding for extradition on the other indictment that it was not the intention of this Government to try respondent on that indictment, but that having secured his extradition on that charge, it was the intention of this Government to imprison him on the judgment of conviction, they would have said that such imprisonment would not be according to the terms of the treaty, and they would have refused to direct his extradition for the purpose stated.

Although the surrender has been made, it is still our duty to determine the legality of the succeeding imprisonment, which depends upon the treaty between this Government and Great Britain, known as the Ashburton treaty of 1842, (8 Stat. 572–6, Art. 10,) and the subsequent one, called a convention, concluded in 1889, and above referred to.

The treaty of 1842 had no express limitation of the right of the demanding country to try a person only for the crime for which he was extradited, and yet this court held that there was such a limitation, and that it was to be found in the "manifest scope and object of the treaty itself;" that there is "no reason to doubt that the fair purpose of the treaty is, that the person shall be delivered up to be tried for that offense and for no other." (*United States* v. *Rauscher*, 119 U. S. 407, 422, 423.)

Again, at the time of the decision of the Rauscher case there were in existence sections 5272 and 5275 R. S. (3 Comp. Stat. p. 3595), both of which are cited and commented upon in that case, and in the course of the opinion of Mr. Justice Miller, at page 423, he said:

"The obvious meaning of these two statutes, which have reference to all treaties of extradition made by the United States, is that the party shall not be delivered up by this Government to be tried for any other offense than that charged in the extradition proceedings; and that, when brought into this country upon similar proceedings, he shall not be arrested or tried for any other offense than that with which he was charged in those proceedings, until he shall have had a reasonable time to return unmolested to the country from which he was brought. This is undoubtedly a Congressional construction of the purpose and meaning of extradition treaties, such as the one we have under consideration, and, whether it is or not, it is conclusive upon the judiciary of the right conferred upon persons brought from a foreign country into this under such proceedings.

"That right, as we understand it, is that he shall be tried only for the offense with which he is charged in the extradition proceedings and for which he was delivered up, and that if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition."

Mr. Justice Gray, page 433, in his concurring opinion, places that concurrence upon the single ground that these sections clearly manifest the will of the political department of the government in the form of an express law that the person should be tried only for the crime charged in the warrant of extradition, and he should be allowed a reasonable time to depart out of the United States before he could be arrested or detained for any other offense. Both grounds were concurred in by a majority of the whole court.

If the question now before us had arisen under the treaty of 1842 and the sections of the Revised Statutes above mentioned, we think the proper construction of the treaty and the sections would have applied to the facts of this case and rendered the imprisonment of the respondent illegal. The manifest scope and object of the treaty itself, even without those sections of the Revised Statutes, would limit the imprisonment as well as the trial to the crime for which extradition had been demanded and granted.

It is true that the tenth article of the treaty contained no specific provision for delivering up a convicted criminal, but if otherwise delivered, he could not have been punished upon a former conviction for another and different offense.

The claim is now made on the part of the Government that "the manifest scope and object of the treaty" of 1842 are altered and enlarged

by the treaty or convention of July 12, 1889. The second, third, sixth and seventh articles of that convention are set forth in the margin.*

It will be perceived that the second article provides that no person surrendered shall be triable or tried, *or be punished*, for any political crime or offense, while article three provides that no person surrendered shall be triable or be tried (leaving out the words "or be punished") for any crime or offense committed prior to the extradition, other than the offense for which he was surrendered, until he shall have had an opportunity for returning to the country from which he was surrendered. Hence it is urged that, as punishment for another offense of which the person had been convicted is not in so many words expressly prohibited in and by article three, a requisition may be obtained for one crime under that article, and when

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*Article II.

A fugitive criminal shall not be surrendered, if the offense in respect of which his surrender is demanded be one of a political character, or if he proves that the requisition for his surrender has in fact been made with a view to try or punish him for an offense of a political character.

No person surrendered by either of the high contracting parties to the other shall be triable or tried, or be punished for any political crime or offense, or for any act connected therewith, committed previously to his extradition.

If any question shall arise as to whether a case comes within the provisions of this article, the decision of the authorities of the government in whose jurisdiction the fugitive shall be at the time shall be final.

Article III.

No person surrendered by or to either of the high contracting parties shall be triable or be tried for any crime or offense, committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered.

Article VI.

The extradition of fugitives under the provisions of this convention and of the said tenth article shall be carried out in the United States and in Her Majesty's dominions, respectively, in conformity with the laws regulating extradition for the time being in force in the surrendering State.

Article VII.

The provisions of the said tenth article and of this convention shall apply to persons convicted of crimes therein respectively named and specified, whose sentence therefor shall not have been executed.

In case of a fugitive criminal alleged to have been convicted of the crime for which his surrender is asked, a copy of the record of the conviction and of the sentence of the court before which such conviction took place, duly authenticated, shall be produced, together with the evidence proving that the prisoner is the person to whom such sentence refers.

possession of the person is thus obtained, he may be punished for another and totally different crime of which he had been convicted before extradition.

We do not concur in this view. Although if the words "or be punished" were contained in the third article the question in this case could not, of course, arise, yet we are satisfied that the whole treaty, taken in connection with that of 1842, fairly construed does not permit of the imprisonment of an extradited person under the facts in this case.

The mere failure to use these words in the third article does not so far change and alter "the manifest scope and object" of the two treaties as to render this imprisonment legal. The general scope of the two treaties makes manifest an intention to prevent a State from obtaining jurisdiction of an individual whose extradition is sought on one ground and for one expressed purpose, and then having obtained possession of his person to use it for another and different purpose. Why the words were left out in the third article of the convention of 1889, when their insertion would have placed the subject entirely at rest, may perhaps be a matter of some possible surprise, yet their absence cannot so far alter the otherwise plain meaning of the two treaties as to give them a totally different construction.

In addition to the provisions of the treaty of 1889 we find still in existence the already-mentioned sections of the Revised Statutes, which prohibit a person's arrest or trial for any other offense than that with which he was charged in the extradition proceedings, until he shall have had a reasonable time to return unmolested from the country to which he was brought.

It is argued, however, that the sections in question have been repealed by implication by the treaty or convention of 1889, and that the respondent, therefore, cannot obtain any benefit from them. We see no fair or reasonable ground upon which to base the claim of repeal. Repeals by implication are never favored, and a later treaty will not be regarded as repealing an earlier statute by implication, unless the two are absolutely incompatible and the statute cannot be enforced without antagonizing the treaty. (*United States* v. *Lee Yen Tai*, 185 U. S. 213.) If both can exist the repeal by implication will not be adjudged. These sections are not incompatible with the treaty or in any way inconsistent therewith. We find nothing in the treaty which provides that a person shall be surrendered for one offense and then that he may be punished for another, such as is the case here. The most that can be asserted is that an inference to that effect perhaps might be drawn from the absence in article 3 of positive language preventing such punishment. But that slight and doubtful inference, resting on such an insufficient foundation, is inadequate to overcome the positive provisions of the statute and the otherwise general scope of both treaties, which are inconsistent with the existence of such right.

It is urged that the construction contended for by the respondent is exceedingly technical and tends to the escape of criminals on refined subtleties of statutory construction, and should not, therefore, be adopted. While the escape of criminals is, of course, to be very greatly deprecated, it is still most important that a treaty of this nature between sovereignties should be construed in accordance with the highest good faith, and that it should not be sought by doubtful construction of some of its provisions to obtain the extradition of a person for one offense and then punish him for another and different offense. Especially should this be the case where the government surrendering the person has refused to make the surrender for the other offense on the ground that such offense was not one covered by the treaty.

Our attention has been directed to various other treaties between this Government and other nations, where provision is expressly made in regard to punishment. They frequently provide that no person shall be triable or tried "or be punished" for any other offense than that for which he was delivered up until he has had an opportunity of returning to the country from which he was surrendered. But because in some of the treaties the words "or be punished" are contained we are not required to hold that in the case before us the absence of those words permits such punishment, when that construction is, as we have said, contrary to the manifest meaning of the whole treaty, and also violates the statutes above cited. The order of the Circuit Court is

Affirmed.

Mr. Justice MOODY did not sit in the case and took no part in its decision.

True copy.

Test:

Clerk Supreme Court U. S.